

***United States Court of Appeals
for the
District of Columbia Circuit***



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FOR MR. JUSTICE ROBE.

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DISTRICT OF COLUMBIA
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IN THE

Court of Appeals, District of Columbia.

JANUARY TERM, 1924.

No. 4092.

71

BEULAH MAY BENNETT, ADMINISTRATRIX OF ROGER D.
BENNETT, APPELLANT,

vs.

WASHINGTON TERMINAL COMPANY, A CORPORATION.

BRIEF ON BEHALF OF APPELLEE.

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BRIEF ON BEHALF OF APPELLEE.

Statement.

On the night of December 23, 1922, at about 12.15 a. m., the body of Roger D. Bennett was found lying partly on the west rail of station track 19 and partly between tracks 18 and 19. The place where the body was found was north of the end of the station sheds, but not beyond the ends of the station platforms, which extend out further than the sheds,

and was from 50 to 120 feet south of "E" bridge. No one saw him on the track or saw him killed. His body was found resting over the west rail after shifting engine No. 29 had passed over the track coming in towards the station and had stopped for the purpose of coupling to a car standing on said track. Because of this movement of the shifting engine, it was supposed that this engine hit and killed the deceased, although no one actually saw such happening.

Bennett was not a track worker or repairman, and was not engaged in any work on the track on which his body was found. He was a car electrician, and his duties required him to inspect, test out, and repair, where necessary, the lighting equipment and batteries on passenger cars coming into the Union Station.

The declaration alleges that on the night in question, Bennett

"was crossing between, over, and upon the railroad tracks of the defendant in the area aforesaid * * * and got upon or near one of the defendant's said tracks, to wit, track 19, at a point or place about 120 feet from the north end of the car sheds at said Union Station, and about 120 feet south of the grade crossing, which grade crossing running about east and west crosses over said track about over said H Street * * * when the defendant with its said yard engine and tender attached, to wit, yard engine 29, approached and came upon said track and over said point or place without having given or caused to be given any warning of the approach of said engine and tender, and without ringing the bell or blowing the whistle or any other lawful, safe and prudent method of notifying plaintiff's intestate of the approach of said engine and tender,"

and said engine and tender then and there struck and injured the decedent, from which injuries he immediately died.

The first count of the declaration adds to the charge of negligence above quoted the further charge that the yard engine was running "at a high and dangerous rate of speed, to wit, 12 or 15 miles an hour."

At the end of the plaintiff's testimony, the defendant moved for a directed verdict and urged as the principal ground for said motion that the plaintiff had failed to sustain the burden of proving any negligence on the part of the defendant, or that the defendant's negligence if there was any such, was the proximate cause of the decedent's death, and said motion was granted and verdict directed. The action of the trial court in granting this motion constitutes the first assignment of error in the record.

Bennett's duties required him to inspect cars both on the upper and lower level tracks in the Union Station. On the night of his death, shortly before the accident, he left the battery-room in the basement of the Union Station and went up in one of the baggage elevators, landing on the concourse at a point between the ends of tracks 10 and 11.

Andrew J. Arnold, a fellow employee, but not engaged in the same line of work, testified that he saw Bennett leave the elevator and walk east on the concourse until he got to the passenger platform between tracks 16 and 17, when he then turned and walked north on said platform until he got to a point beyond the station sheds. Arnold claims that he was following Bennett, about 30 yards behind him, and that he turned at the station platform between tracks 15 and 16, and also walked in a northerly direction on that platform.

Arnold's job was putting ice in the coolers of day coaches

and diners, coming into the station, but on the night of the accident he was oiling diners, and he claims that he walked out the platform between 15 and 16 tracks for the purpose of seeing if there were any cars in that portion of the station needing his attention. He claims that he and Bennett continued walking out these two platforms, Bennett being about 30 yards in front of him, until Bennett had passed beyond the end of the station sheds. His statement as to what thereafter happened and as to his personal knowledge of the situation is flatly contradicted by other witnesses offered by the plaintiff. Indeed, it would appear from his own cross-examination that he made such contradictory statements to other employees after the accident as to his whereabouts and his knowledge of the accident as to convey serious doubt on his claim that he was walking in the rear of Bennett just prior to the accident, or that he had any personal knowledge of the accident or knew anything about it until told of it after it had happened, and the body of the decedent had been found. On cross-examination, however, he testified as follows (Rec., p. 15) :

“Bennett walked out on the platform between 16 and 17 tracks down to within about 12 or 13 feet of the cross over in the yard. That cross over is down in the yard. He walked 40 or 50 yards beyond the end of the station sheds before he stepped on the track. The first track he stepped on was track 18. That was right alongside of the platform. In walking down the platform between 16 and 17 you would have to cross 17 before getting to 18. I was on 15 platform further west. This platform is between tracks 15 and 16. A train was blowing a whistle around 17 and 18 tracks but I did not get to the point where it was because they had it cut off and

gone before I got over there. As me and Bennett walked down these two separate platforms, I guess he was about 30 yards ahead of me. * * * The last I saw of him was when he had stepped off the station platform across track 17 right alongside of it, crossed track 18, which was next to it, and was about to step on the track 19 when I saw a Pennsylvania train coming out of 18 and it cut off my view and I did not see him hit at all. The train that cut off my view was a Pennsylvania passenger train, and it moved out of track 18 from the station. When Bennett passed over track 18, this train was about 20 or 25 feet away from him. He had not cleared track 18. He was just across it. He had one of his feet up on the rail going across the last time I saw him. The first rail of track 18.

This train was about 25 feet away from him, moving towards him, backing out. He kept on going across track 18 and the train kept on and my view was cut off. The last time I seen him he was looking around like that (indicating), looking at this train coming out of 18. * * * This train moving out 18 did not stop in front of me. After it had passed I saw the shifting engine standing in on track 19. It was standing away up under the shed; midway of the shed on track 19. It was to the south of the point where I saw Bennett crossing the track; closer to the station than where Bennett was. It was about 30 yards from the concourse, heading in there at the station.

Q. Now when you saw Bennett crossing track 18 could you see the shifting engine coming?

A. Yes, sir.

Q. Where was that?

A. That was about 35 yards, I guess, below.

Q. Below? What do you mean by 'below'?

A. Coming this way; coming into the station.

Q. That is, it was north of the point where Bennett was?

A. Yes, sir.

* * * * *

Q. Do you know where the cross over is?

A. Yes, sir.

Q. Where was this shifting engine when you first saw it with reference to that cross over?

A. About 35 feet from that cross over.

Q. Which direction? North or south of it?

A. North.

Q. It was north of it?

A. Yes, sir.

Q. So that if the cross over was immediately south of the bridge, the engine was further back north, either north of the bridge or just going under the bridge? Is that right?

A. Well, I couldn't say whether it was under the bridge or beyond the bridge.

Q. But you know it was north of the cross over?

A. Yes, sir.

Q. How far south of the cross over would you say was the point where Bennett was then entering upon track 19, to cross it?

A. About 12 or 15 feet.

Q. Only 12 or 15 feet south of the cross over?

A. Yes, sir.

Q. He was not walking on the cross over at all?

A. No, sir.

Q. Just cutting across the tracks?

A. Yes, sir.

Q. Did the Pennsylvania train continue on so as to cut off your view of the shifting engine as well as your view of Bennett?

A. Yes, sir.

Q. Where was the shifting engine when the Pennsylvania train cut off your view so that you could not see it?

A. Where was it at the time?

Q. Yes, just at that moment.

A. It was just about 35 feet of the cross over.

Q. 35 feet or 35 yards.

A. 35 yards.

Q. It was about 35 yards north of the cross over?

A. Yes, sir."

The plat offered in evidence shows that if Bennett was walking out the platform between tracks 16 and 17, and then turned and walked in an easterly direction, he would have to first cross track 17, then cross the platform between the tracks 17 and 18, and then cross track 18 to track 19, these tracks being about 6 feet apart.

Arnold also claimed that after Bennett had nearly gotten over track 18 a Pennsylvania train was then backing out of track 18, and when this train was within 20 or 25 feet of Bennett, it obstructed his view and he never saw Bennett again, and at that time the shifting engine was further out in the yard on track 19, either under or beyond "E" bridge, and 35 yards north of the cross-over.

The position of these two movements as testified to by Arnold is directly contradicted by witnesses Wendell and McCleary, who testified on behalf of plaintiff. Wendell was the engineer in charge of the shifting engine, and he testified (Rec., p. 21) that as the shifting engine moved in towards the station from the yard he passed the forward end of the backing Pennsylvania train at about the north end of "K" tower, which is some considerable distance out in the yard, north of "E" bridge, and that his engine passed the

Pennsylvania engine, which was the rear end of the Pennsylvania movement, at a point about half way between "K" tower and "E" bridge.

McCleary testified to the same effect (Rec., p. 24).

Continuing his cross-examination, Arnold testified as follows (Rec., p. 18) :

"After the Pennsylvania passed cutting my view off, I did not know what Bennett did or what his actions were. I could not see him at all. The last glimpse I had of Bennett he had gotten all the way over track 18 and just had one foot on the side of 19. Witness does not know that the distance between tracks 18 and 19 there is 8 feet but would guess it to be about 6 feet between the east rail of 18 and the west rail of 19. When I last saw him he had one foot on the side between the two tracks 18 and 19. I could not see if he had gotten entirely off track 18 because the train cut me off, but I do not think he was hit by the Pennsylvania train. I know he was not hit by it because the train was a little too far from him. I did not continue to watch Bennett until the train got to the spot where he had crossed the track and could not see how far he had gotten away from that spot when the train reached it. He was headed towards track 19. We were both walking north on different platforms, he being about 90 feet ahead of me. When Bennett started across the tracks, I found there was nothing out there to be done on that side and I turned around and walked back to the station concourse. The last I seen of him when I turned around he was going across 18 track."

The shifting engine was in charge of Engineer Wendell and Fireman Altman, and the shifting crew were riding on

the engine and consisted of Conductor Laycock, Brakeman McCleary and Brakeman Poe. Plaintiff's counsel did not call the fireman and Brakeman Poe at all to testify, examined Conductor Laycock to a very limited extent, but did question Engineer Wendell and Brakeman McCleary as to their knowledge of the facts relating to the accident. From their testimony it appears that the engineer and fireman and shifting crew had relieved a prior crew at midnight, and the engine had come into the station for that purpose; that thereafter, in performance of its duties, the engine had moved out in the yard, and shortly prior to the accident was coming into the station on track 19, and it came to a stop a few feet from a car standing on said track 19, to which it intended to couple. The engine was backing in, the engineer and fireman being in their respective positions and the train crew standing on the apron between the engine and the tender, Brakeman McCleary being on the west side holding on to the grab irons and was leaning outward and looking south along the track in the direction in which the engine was moving. Brakeman Poe was on the opposite side of the apron, or standing on the step, engaged in the same occupation. There was an electric light on the approaching end of the tender, shining brightly, and there were lights in the engine cab. The engineer says that he began to ring the bell just before the engine got to or under "E" bridge because there was a plank cross-over or walk-way across the tracks and immediately south of the abutment of the bridge (Rec., p. 20). He further testified (Rec., p. 20):

"I was sitting facing the direction the engine was going. My left arm, left elbow, was on the arm rest of the window, my head and shoulders out of the win-

dow, facing the direction the engine was going. I was on the east side of the engine so that if there was anyone on the track, I could see him notwithstanding the tender, and I could see him even though he was on the west side of the track ahead of me. I saw no one. If there had been anyone there, I could have seen him by looking. I was looking and there was no one there within the range."

This witness further testified that he first learned of Bennett's death after he had stopped near the car to which they intended to couple, and one of the brakemen had gone back to see what caused the jolting of the engine, which he presumed was the result of a broken rail, but found on investigation to be the body of a man. McCleary was the brakeman who went back to discover the cause of the jolting and found the body, and he says (Rec., p. 22) :

"It was about 50 feet south of the grade crossing at 'E' bridge. * * * When the shifting engine passed that point, I observed a motion that indicated that the wheel of the engine had passed over some obstruction on the track. I went back expecting to find a broken rail because of the roughness when the engine passed over this point."

He further testified :

"I was on the part of the engine known as the apron of the engine, between the cab and the coal tender, standing on the west side, my hands on the two grab irons, looking back towards the Union Station. The two grab irons I had hold of are located one on the side of the cab of the engine and the other on the side of the tank. In order to stand in the position which I was, two hands on the grab irons,

you have to look out, not away from the engine, but in a position like this, looking this way (indicating). I continued in this position, from a point north of 'E' bridge until the engine stopped. I continued to look back and saw no one enter on track 19 as we passed under 'E' bridge, nor after I got beyond 'E' bridge towards Union Station. The body to the best of my knowledge was 50 feet south of 'E' bridge."

The engineer also testified that before reaching "E" bridge his engine was traveling at about 12 miles an hour, and he then slowed down on account of approaching the cars that they were going to couple to, and at the point where Bennett's body was discovered he was going about 6 miles an hour and was then within two car lengths of the cars that they were to couple to (Rec., p. 21). The engineer, the conductor, and the brakeman all testified that this movement of the shifting engine was made in the usual and ordinary way and manner that shifting movements are usually conducted in the yard (Rec., pp. 23 & 24).

ARGUMENT.

I.

The First Assignment of Error is to the Effect That the Trial Court Committed Error in Directing a Verdict for the Defendant.

This assignment of error is based upon the ruling of the trial court that the plaintiff had failed to sustain the burden of proving that the negligence of the defendant was the proximate cause of the decedent's death.

We will discuss the facts and the law relating to this assignment first, not only because of its controlling importance, but because we believe that if the trial court was correct in directing a verdict in favor of the defendant all of the other assignments of error, relating only to rulings of the court on the admission or exclusion of evidence, are immaterial and would have little or no effect upon the decision of this case.

We have quoted at some length from the testimony of plaintiff's witnesses, not only for convenient reference, but because the conflict of statement thus brought together serves to illustrate more certainly the indefinite and uncertain character of the evidence, which evidence, we think, when analyzed, wholly fails to explain how and why Bennett lost his life and falls far short of sustaining the burden of proving negligence on the part of defendant as the proximate cause of the accident. Indeed, unless we indulge in assumptions and base inferences upon other inferences, no plausible reason or explanation can be gathered from the evidence showing why Bennett lost his life. It is to be remembered that he was not a track worker or a track walker in the sense that his employment was such as to require his being or remaining upon the tracks. His employment as car electrician did require that he should go from point to point on the station tracks or in the yard to inspect and, if necessary, repair the electrical appliances in cars that might be there standing, but it is not shown that upon any of these occasions, and particularly upon the occasion of his injury, it became necessary for him to leave a place of safety on the platform and cut across the tracks to accomplish his end.

There is absolutely nothing in the record, therefore, to justify the suggestion on page 15 of brief for appellant that

Bennett was "working or walking on the track," and that he was "in a position of danger," and "that he was unconscious of the approach of the shifting engine and was not going to get out of the way." The declaration itself alleges that Bennett was "*crossing*" track 19 when injured. And Arnold, after stating that he saw Bennett walking north on the station platform between tracks 16 and 17, said (Rec., p. 14):

"When I last saw him he was going towards 19 track, had his foot on the last rail of 18 track, going on 19. These tracks are between 5 and 6 feet apart. *Bennett was walking pretty lively.* This train backing out was about 20 or 25 feet away from him, I guess."

He further testified that at that moment he saw the shifting engine, and that it "was about 35 yards below where Bennett crossed over. That engine was going I guess about 15 miles."

The uncertainty of Arnold's testimony as to the exact location of deceased at the last moment he claims to have seen Bennett, as shown by his direct and cross-examination, and the uncertainty created in his testimony, taken in connection with that of the other witnesses as to the movements of the Pennsylvania train and the shifting engine immediately prior to the accident, might be due to the fact that Arnold says he was 30 yards behind Bennett, and this necessitated his looking in a diagonal direction across the track and two platforms, and there was no reason why his attention should have been particularly attracted to the movements of the man ahead of him; or it might be due to the fact that Arnold was not walking out between tracks 15 and 16 behind Bennett just prior to the accident at all, as stated by him, and that he knew nothing of the movements of Bennett or of the train and

engine or of the accident until a few minutes after the accident had happened, when his attention was called by another employee to a crowd gathered around the spot where the body was found. But let us assume, for the sake of argument, that his testimony is correct, and that Bennett, when last seen by him, had turned off of the platform between tracks 17 and 18 and had crossed or was in the act of crossing track 18, headed towards track 19, "walking pretty lively." Arnold says that he does not think the Pennsylvania train hit Bennett, although it was moving at the rate of 15 miles an hour, because it was too far away, it being 20 or 25 feet away from him at the time he was in the act of crossing track 18. He does not pretend to know what Bennett's movements were after the Pennsylvania train obstructed his view, and he did not see the accident. If Bennett did not step off of the platform so close in front of the backing Pennsylvania train as to be hit and killed by it on track 18 and his body thrown upon the west rail of track 19, but continued at a lively gait towards track 19, how can it possibly be explained, according to Arnold's testimony, that the shifting engine, at that time 35 yards or 105 feet away and moving towards him at the rate of 15 miles an hour, could possibly reach him in time to hit him before he had passed over the west rail of track 19. That rail was some 6 feet away from Bennett when Arnold claims he last saw him. It would have taken the shifting engine traveling at the rate of 15 miles an hour at least 5 seconds to reach the point of accident, and anyone can determine by an actual test that a man walking at a lively gait can cover more than 30 feet in 5 seconds. If the shifting engine was only traveling at the rate of 12 miles an hour, as testified to by the engineer, and surely he was in a

position to more correctly gauge its speed than Arnold, then it would have taken the engine 6 seconds to reach the point of accident.

Furthermore, Wendell says that when he reached "E" bridge he began slowing down, and by the time he reached the spot where Bennett's body was found he was traveling only at the rate of 6 miles an hour and was about coming to a stop in order to couple to the cars immediately in front of him. If this evidence is true, it indicates that the shifting engine took even more than 6 seconds to reach the point of accident.

Where was Bennett and what was he doing all this time? Had he been hit by the Pennsylvania train and thrown upon the next track? Did he become dizzy from some physical weakness, or did he stumble and fall and hit his head against the rail, thus making him unconscious? Did he stop after just clearing the Pennsylvania train on track 18 and stand between tracks 18 and 19 or on the edge of track 19, although his apparent intention when last seen was to hurry across both tracks for some purpose of his own? In 5 or 6 seconds he could not only have crossed track 19 to the platform between tracks 19 and 20 with ease, but he could have turned around after reaching that point and have come back to the point of injury before the shifting engine could have gotten there.

There is no answer to be found to any of these questions in the record, except that the engineer and Brakeman McCleary swear positively that they were on the lookout ahead of their engine as they approached the point of accident, and did not see anyone enter upon that track from either the west or the east side thereof. There is nothing in the record

having the slightest tendency to impeach the testimony of these two witnesses. If their testimony is to be given the consideration to which it is entitled in the absence of impeachment, the Pennsylvania train had passed out of the station track and reached "K" tower out in the yard before the shifting engine got to "E" bridge, which is north of the point of accident. If this is true, then Bennett did not pass over track 18 in front of the Pennsylvania train, but started across that track after the Pennsylvania train had gone out, and he must have entered upon track 19 so closely in front of the approaching shifting engine that he could not be seen by the engineer (Rec., p. 20) and before the brakeman could observe his movements, although he was looking down that track. If the Pennsylvania train did hit and kill Bennett, such fact would not support the cause of action set out in the declaration. The suggestion that Bennett may have been thrown or stumbled and fell upon track 19 and was lying there as engine 29 approached and should have been seen by the engineer and fireman is equally without support in the evidence, and whether such was or was not the fact, or whether he could have or should have been seen while in that position by the men on the engine in time to have stopped the same before running over him, is equally untenable, because it involves an inference based upon an inference.

Authorities are scarcely needed to support the proposition that, except in rare cases, negligence cannot be inferred from the mere happening of an accident and cannot be conjectured, but must be proved. We may refer, however, to the following decisions:

Washington Sou. R. R. Co. vs. Smith, 45 App. D. C.,
192.

Oil Co. vs. Van Elderen, 137 Fed., 571.

Clare vs. Railroad, 167 Mass., 39.

Leary vs. Railroad, 173 Mass., 373.

Warner vs. Railroad, 178 Mo., 125.

Patton vs. Railroad Co., 179 U. S., 658.

In *Patton vs. Railroad Company* the Supreme Court, at 663, said:

“The fact of accident (to an employee) carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. * * * In the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence. The evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs.”

The mere fact that this suit is based upon the Employers' Liability Act does not relieve the plaintiff from the positive

duty of alleging and proving negligence by the defendant in order to entitle her to recover. This court so held in the case of *Washington Southern R. R. Co. vs. Smith, supra*.

In the case of *New Orleans & N. E. R. R. Co. vs. Harris*, 247 U. S., at p. 371, the Supreme Court said:

“The Federal courts have long held that where a suit is brought against a railroad for injuries to an employee resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish. (Citations.) In proceedings brought under the Federal Employers’ Liability Act rights and obligations depend upon it and applicable principles of common law as interpreted and applied in Federal courts; and negligence is essential to recovery.”

Also *Southern Ry. Co. vs. Gray*, 241 U. S., at 339.

There is no direct proof in the record as to how or why this accident happened. The plaintiff alleged certain specific allegations of negligence in her declaration, but none of said allegations was proven. She first alleges that the shifting engine approached along track 19 “at a high and dangerous rate of speed, to wit, 12 or 15 miles an hour.” The only evidence in the record on the subject of speed is that Arnold says when he saw the shifting engine at about “E” bridge or beyond it was 35 yards away from the point of injury, and he guessed was going about 15 miles (Rec., p. 14). Wendell testified that at “E” bridge he was traveling about 12 miles, and from that point to the point of accident slowed down to 6 miles (Rec., p. 21). These were the only witnesses asked anything about speed, and no one testifies that 15 miles in the yard or 12 miles at “E” bridge was a high and dangerous rate of speed.

The next allegation of negligence was that the shifting engine approached the point of accident without ringing a bell or blowing a whistle or giving any other notice or warning of its approach. The only evidence on the question is the testimony of Wendell, who says that the bell was ringing because he was ringing it himself, and that he began ringing the bell before he reached "E" bridge; and, further, that the electric headlight on the tender was burning brightly.

The only other allegation of negligence is found in the first count of the declaration, but not repeated in the second, that the conductor, brakeman, engineer, and fireman of the engine saw the decedent upon or near the track and saw and knew that he was unconscious of the approach of said engine and would not get out of the way and knew the same in ample time to have enabled the defendant to have avoided injuring or killing him by stopping said engine, or that these agents and employees by the exercise of reasonable lookout, care, and attention would have seen the said decedent on or near said track and would have known that he was unconscious of the approach of the engine and would not get out of the way and would have seen and known the same in time to have enabled them to avoid injuring or killing said decedent by stopping said engine. The conductor and fireman were not questioned on the subject at all, and the other two witnesses disproved this allegation of the declaration. These allegations were copied from the declaration in the Callahan case, but the facts in the two cases are entirely different.

We have endeavored to point out that the evidence wholly fails to establish any of the claims of negligence set out in the declaration or any other negligence on the part of the defendant and its employees which would require the submission of this case to the jury.

There is no proof whatever that the deceased was on track 19 as said shifting engine approached, except that his body was afterwards found there. How he reached that spot, what he was doing there, and how long he was there before being run over by the shifting engine is a matter of pure speculation and inference. If we are to indulge in the inference that he was in fact on the west rail of track 19 for some appreciable time before being run over, but of which there is no proof, there is no evidence that he was unconscious of the approach of the shifting engine, or that the employees of the engine could or should, in the exercise of reasonable care, have seen that he was unconscious of its approach and was not going to get out of the way in time to have enabled them to stop the engine and avoid injuring or killing him, and to permit the jury to speculate on this subject would result in permitting them to draw inferences from inferences or presumptions resting upon the basis of other presumptions. This mode of arriving at a conclusion of fact is universally inadmissible.

United States vs. Ross, 92 U. S., 281.

“We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved, but the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote. The only presumptions of fact which the law recognizes are immediate inferences from facts proved.”

Manning vs. Insurance Co., 100 U. S., at p. 697.

“The requirement that the logical inference styled a presumption of fact should be a strong, natural, and immediate one, brings as a corollary the rule that no inference can legitimately be based upon a fact the existence of which itself rests upon a prior inference. In other words, there can be, in the great majority of cases, no presumption upon a presumption. On the contrary, the fact used as the basis of the inference, the *terminus a quo*, so to speak, must be established in a clear manner, devoid of all uncertainty.”

Atchison, T. & S. F. Ry. Co. vs. De Sedillo,
219 Fed., at p. 689.

Smith vs. Ill. Cen. R. R. Co., 200 Fed., 553.

Lizotte vs. Ill. Cen. et al., 196 Mass., at p. 523.

Levy vs. Vaughn, 42 App. D. C., 146.

A case involving facts very similar to the case at bar is *Moynihan vs. Boston & Maine R. R.*, 227 Mass., 180.

In the case of *Looney vs. Metropolitan R. R. Co.*, 200 U. S., at page 488, the court said:

“But the negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another.”

In the case of *Penna. R. R. Co. vs. Nelson*, 259 Fed., at page 160, the court said:

“The disposition to be made of this case in this court must depend upon whether there was any evidence in the case which warranted the jury in finding that the deceased met his death in the manner which the plaintiff claims; for it is settled law that it is error

to submit a question to a jury where there is no evidence upon the subject. In *Improvement Co. v. Munson*, 14 Wall., 442, the court declared that it was held at one time that if there was a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority had established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

“In *Pollock v. Pollock*, 71 N. Y., 137, the New York Court of Appeals said: ‘Insufficient evidence is, in the eye of the law, no evidence,’ and cited the language of Maule, J., in *Jewell v. Parr*, 13 C. B., 916, where he said: ‘When we say that there is no evidence to go to a jury, we do not mean literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established.’ ”

To the same effect is *Weaver vs. Railroad Co.*, 3 App. D. C., at page 455.

Counsel for appellant have endeavored from the inception of this case to bring it within the ruling of this court in the Callahan case, 51 App. D. C., 85, even to the extent of copying *mutatis mutandis* the allegations of the Callahan declaration to the effect that if the employees on the engine were in the exercise of due care they would have seen the deceased on the track unconscious of the approach of the engine and would have seen these things in time to have stopped the engine and avoided running over him, but the similarity of

the two cases ends with the allegations of the declaration. In point of fact and in proof the cases are entirely dissimilar. In the case at bar Bennett was not a track worker or at work on the track or even walking along the track, but when last seen his actions indicated that he intended to cross the track at right angles and was walking at a lively gait.

The testimony of the members of the engine and shifting crew who were produced by plaintiff was to the effect that the movement in which they were engaged with the shifting engine was an usual and ordinary movement, made in the usual and ordinary way, and they were in the strict performance of their duties.

Callahan, it will be recalled, was the foreman of switches, and for some ten minutes before the accident was actually engaged in the work of repairing a switch on track 37, in a kneeling or stooping position, and with his back to the approaching engine which killed him. Under the rules of the company he was supplied with a helper, whose duty it was to keep guard over him and to warn him of approaching movements while he was actually engaged in the work of repairing the switch. The helper so negligently performed this duty that he permitted a switching engine to approach and kill both Callahan and himself, not only without giving Callahan any warning, but apparently without having seen the approaching engine. Under these circumstances this court said:

“Callahan was relieved from keeping a lookout for approaching trains, since, under the rules, he could rely upon his helper and the trainmen to protect him. We deem it unnecessary, therefore, to analyze the testimony, since the accident could only have

occurred through the negligence of the helper or trainmen or all. Their negligence is the negligence of the defendant, for which it is liable."

In the Callahan case there was direct evidence that Callahan was in fact on track 37 engaged in work on a switch in the middle of that track for several minutes before the accident. No one saw him leave the track, and after the shifting engine stopped his body and his tools were found on the track and in close proximity to the switch on which he had been working. From these *facts, which were actually proven*, this court held that the jury would be justified in inferring that Callahan was in fact on the track all the time the engine was approaching, engaged in his occupation, in a kneeling or stooping position, with his back to the approaching engine, and apparently unconscious of its approach, and that all of this could have been seen by the engine crew if they had been keeping a careful lookout.

That is a very different situation from the one presented by the record in this case, and the ruling of this court was not in conflict with the decisions hereinbefore cited.

II.

The Facts Proven do Not Admit of the Application of the Doctrine of Last Clear Chance in This Case, and, Even if They Did, That Rule is Not Applicable to Steam Railroads Operating Switching Engines in Their Yards.

Because of the utter failure of the evidence to prove that Bennett was in fact on track 19 for any appreciable time be-

fore the shifting engine reached the spot where his body was afterwards found, counsel for appellant, at the trial in the court below, argued, and are here contending, that the rule of the doctrine of last clear chance as applied by this court to street railroads operating on the public streets of this city should be applied to this case, in order to help out the weakness or absence of evidence sufficient to justify the court in sending this case to the jury. To do this they must necessarily indulge in inferences and build one presumption upon another in order to create a situation which would permit of applying the last clear chance rule to the case. In other words, they must assume that Bennett got on track 19 at a time when the shifting engine was so far away from him that the employees on said engine could, in the exercise of reasonable care, have seen him there and have seen that he was not going to leave the track in time to have enabled them to stop the engine and avoid running over him. It must also be inferred that after getting on the track Bennett stopped and remained there, or at least indicated by his conduct that he did not intend to leave the track. *They would also have to assume that Bennett himself was negligent.*

In these respects the case is radically different from the Callahan case. Because the evidence in the Callahan case showed as a matter of fact that he was actually engaged in work on track 37 for several minutes prior to his injury, in a kneeling position and with his back to the approaching engine, and his body was found there after the accident, these facts, in the opinion of the court, justified the jury in finding that Callahan was on track 37 during all of the time the switching engine was approaching him, and because of his occupation and his position, as shown by the evidence, that the jury

could find he was unconscious of the approach of the engine, and the engineer and fireman, if keeping a reasonable lookout, could have seen and appreciated his position and his inattention to the danger in time to have stopped and avoided running over him.

We respectfully insist that there is no evidence which would permit the application of this last clear chance rule to this case, or would permit or justify any jury in inferring negligence on the part of the employees on the shifting engine for their failure to see Bennett on the track and unconscious of the approach of the engine in time to have avoided injuring him, which could reasonably be claimed as the proximate cause of the injury. Application of the rule at all presupposes negligence on the part of both the decedent and the defendant. To take advantage of the rule the plaintiff would have to admit that the deceased himself was guilty of negligence which contributed to his injury, but such a claim was not advanced in the court below or in appellant's brief filed here.

In the very similar case of *Smith vs. Ill. Cen. R. Co.*, 200 Fed., 553, the same argument was made by counsel for plaintiff as is now made by appellant, but the court said (at page 556) :

"Plaintiff urges that decedent was in plain view of the hostler (had he looked) all the time the latter's engine was being driven 230 feet, and that instead of making any effort to stop his engine and prevent the accident, he ran the engine slowly and noiselessly upon the deceased without giving him warning of the engine's approach by sounding whistle or ringing bell, and that the case is thus brought within the principle of 'the last clear chance,' viz., that the con-

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tributory negligence of the party injured will not defeat the action if it be shown that defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence. (Citations.) Strictly speaking, the doctrine invoked does not apply here, for we are not considering whether the deceased was contributorily negligent, but applying the principle invoked to the question of defendant's negligence, it is clear that the evidence, taken together, does not warrant the conclusion urged by plaintiff involving, as that conclusion does, a presumption which we think not permissible (in preference to other theories equally reasonable), that decedent remained constantly on the track and apparently unmindful of the following engine from the time he was last seen by the fireman until he was struck."

In the light of the authorities hereinbefore quoted, and in the absence of proof of facts from which legitimate inferences could be drawn to support a charge of negligence against the defendant, we respectfully insist that the last clear chance rule has no application in this case whatever.

Furthermore, even if the necessary facts were present in this case, then we insist that the last clear chance doctrine does not apply to the crew of a shifting engine operating in the private yard of a steam railroad company unless and until it appears from the evidence that the employees in charge of said engine actually saw the man on the track and in a position of danger from which he could not or would not extricate himself, and that said employees saw and realized this in sufficient time to have enabled them to stop the engine and avoid hitting him. This question was not raised or considered at all either by court or counsel in the Callahan

case, due to the contention of counsel for appellant that the evidence was insufficient to show that Callahan had remained on track 37, and therefore insufficient to prove any negligence on the part of the defendant.

The doctrine on this subject as contended for by appellant is in fact not the rule of last clear chance, but rather a qualification thereof which has grown up in recent years and applied to conditions of intensive traffic in urban communities unknown at the time the rule was enunciated in *Davies vs. Mann*, 10 M. & W., 546. Whatever may be said in favor of the rule as applied to street railroads operating in cities certainly does not apply to steam railroads operating in the country or in their private yards, and we contend that in the case of a traveler on a public road crossing in the country, or in the case of an employee in a switching yard, actual knowledge on the part of operatives of an engine of the position of peril of a traveler or of another employee upon the tracks through his own negligence is necessary for the application of the doctrine. This position is supported by the decisions of the courts of the District of Columbia and other courts, and is not affected by the qualification of that doctrine applied by this court to street cars and motor trucks in cities.

In *Gerlach vs. Cumberland Co.*, 121 Atl., at page 578 (Md., 1923), the court said:

“The plaintiff offered a prayer involving the doctrine of the last clear chance, which, we think, the court very properly refused. The accident in this case occurred at a public crossing in the open country, and the modified rule laid down in *Consolidated Ry. Co. vs. Rifcowitz*, 89 Md., 338, and *United Railways vs. Ward*, 113 Md., 649, and other cases applicable to much used streets of a town or city does not apply to this case.”

In *Johnson vs. B. & P. Co.*, 6 Mackey, 232, the accident happened at Sheriff Crossing, where the Anacostia City road crosses the railroad, apparently in the vicinity of Bennings Station. The court, in approving the refusal of an instruction prayed by defendant, said:

“But it omitted all consideration of the defendant’s negligence which might have rendered it liable even if the supposal of the prayer were established, since the negligence of one party does not exonerate the other *who is aware* of such negligence from an effort to avoid an accident. * * *”

The earliest case in the Court of Appeals involving a discussion of the necessity of actual knowledge by the defendant of plaintiff’s peril was *Richmond & Danville vs. Didzoneit*, 1 App. D. C., 482. In that case action was for personal injuries to a boy who sat on a railroad platform within 18 inches or two feet of the track and went to sleep. The boy’s foot was struck and crushed by an engine. The court said:

“* * * It will be noticed that it is reckless injury and wilful negligence that will not excuse a defendant, when they occur after a case of contributory negligence in the plaintiff. Negligence superimposed upon negligence does not amount to wilfulness; nor is the failure, superinduced by negligence, to have knowledge of a dangerous condition the equivalent of actual knowledge of such a condition. And it is only when a defendant has actual knowledge of the plaintiff’s danger, and could by the exercise of ordinary care and prudence, have avoided the resulting injury, that the plaintiff is relieved from the liability of having his own negligence charged against him, and the defendant’s negligence is re-

garded as the proximate and exclusive cause of the injury. The fact that it may have been negligence in the defendant not to have known of the plaintiff's danger, and that the defendant might have ascertained the danger by the exercise of due care, cannot be permitted to have the effect of actual knowledge, so as to charge the defendant with recklessness. To allow such an effect would result in the overthrow of the whole doctrine of contributory negligence. It would be impossible, upon such a theory, ever to hold any one to the consequences of his own misconduct. For if negligence to acquire knowledge were the equivalent of knowledge, in the contemplation of the law of torts, every act of negligence should be construed as an act of wilfulness." * * *

The court quoted from *Inland Co. vs. Tolson*, 139 U. S., 551, and said:

"From this it is plain that the defendant's liability in such cases is based upon the fact that it had, or must have had actual knowledge of the plaintiff's danger, and that the negligence for which it was responsible is negligence supervening after discovery of such danger. That it had knowledge may, of course, be proved by the proof of circumstances from which the jury may infer it. When there is no proof of any such knowledge, or of any circumstances from which the jury might be justified in inferring its existence, this modification of the general rule will not apply. * * *."

Drury's Table of Cases indicates that the *Didzoneit* case has been cited by the court in only three subsequent opinions, the *Snashall* case, 3 App. D. C., at page 435; *Stearman vs. Railroad*, 6 App. D. C., at page 54, and *Cullen vs. Rail-*

road, 8 App. D. C., at page 74. The reference in *Metropolitan Railroad Co. vs. Snashall*, 3 App. D. C., beginning at page 434, is as follows:

"The instruction was substantially to the effect that, though the plaintiff may have shown a want of reasonable care, in getting upon the car in its crowded condition, and in attempting to ride upon the platform thereof, still this would not relieve the defendant from liability, if, *knowing her situation and consequent danger*, it might by the exercise of reasonable care under the circumstances, have prevented injury to her. This instruction does infringe the general rule, itself well recognized elsewhere in the charge, that there can be no recovery *where the negligence of both parties has concurred in producing the injury*. It is a qualification of this general rule, which has the sanction of the highest authority." *Inland Co. vs. Tolson*, 139 U. S., 551; and cases cited, p. 558; *R. R. Co. vs. Geis*, 31 Md., 357; see also *R. R. Co. vs. Didzoneit*, 1 App. D. C., 482.

In *Stearman vs. B. & O.*, 6 App. D. C., 46, p. 54, the court says:

"* * * It is earnestly contended that it was the engineer's duty to keep a sharp lookout ahead, and that, had he done so, he must inevitably have seen deceased in time to give the usual warning, or to stop the engine; and hence, that he was guilty of negligence. Concede this, and yet something more is required to warrant a recovery in a case like this, where the plaintiff's own evidence discloses the fact that the negligence of his intestate contributed directly to the accident. In holding that there was no case for submission to the jury, the trial court followed the rule laid down by this court in the case of *R. & D. vs. Didzoneit*, 1 App. D. C., 482.

The court then quotes from the *Didzoneit* case in part as follows:

“And it is only when a defendant has actual knowledge of the plaintiff’s danger, and could, by the exercise of ordinary care and prudence have avoided the resulting injury that the plaintiff is relieved from the liability of having his own negligence charged against him, and the defendant’s negligence is regarded as the proximate and exclusive cause of the injury. * * *.”

The last of these references to the *Didzoneit* case is in *Cullen vs. B. & P. R. R. Co.*, 8 App. D. C., 69 (1896), at p. 73, where the court said:

“* * * We are now asked to hold that, in order to hold the defendant liable, he need not have knowledge of the plaintiff’s exposed situation, but that it would be sufficient if with reasonable diligence on his part he could have had that knowledge, and thereafter acted with reasonable care.

“We cannot admit the soundness of this proposition. It seems to us to be reasoning in a vicious circle; and that it would overthrow the whole law of contributory negligence; in fact, the whole law of negligence, by placing the ultimate liability for damages upon the person who has committed the first fault, which would be a most dangerous doctrine. For it seeks to regard the primary negligence as the equivalent of the subsequently intervening negligence to which the authorities refer as justifying the qualification of the law that has been stated. And in fact the acts of negligence on the part of the defendant relied upon in this case to relieve the deceased from the consequences of his own contributory negligence, are the primary and only acts of negligence charged against

the defendant in the first instance, namely, the absence of a fence, an unlawful rate of speed, and the fact that the engineer was not looking in the proper direction. These had all supervened before the exposure of himself to danger by the deceased; and it seems to us that it would be a perversion of the law of negligence to hold that, because they were continued after the deceased had exposed himself to danger, and without the occurrence of anything that would give notice or knowledge of such exposure, yet the fact of the exposure changed the character of the defendant's action from negligence to recklessness. In nearly all cases, if the defendant had not been negligent in the first instance, he could have ascertained the fact of the contributory negligence of the plaintiff in due time and avoided its consequences. To hold him to liability for that failure would be to relieve the plaintiff from the legal consequences of contributory negligence in all cases.

"We had this same proposition pressed upon us in the case of the *Richmond & Danville Co. vs. Didzoneit*, 1 App. D. C., 482, and we there held, as we now hold, that it is untenable. We think the ruling in that case must govern the present.

"We think that there was no error in the instructions given by the court below to the jury to return a verdict for the defendant; and the judgment of that court must, therefore, be affirmed with costs.

* * *."

The earlier street-car cases make the same statement of the rule as is found in the cases from which extracts have been given.

In *Capital Traction Co. vs. Divver*, 33 App. D. C., at p. 335, the court said:

“Since *Davies vs. Mann*, 10 Mees. & W., 546, the courts of England and of this country have adopted the rule that the plaintiff may recover for an injury caused by the defendant’s negligence, notwithstanding the plaintiff’s own negligence exposed him to the risk of injury, if the defendant’s negligence, *after the defendant became aware of the plaintiff’s danger*, was directly responsible for the injury. In such a situation, however, ordinary care is all that is required of the defendant.”

In *Chunn vs. City & Sub. Ry.*, 207 U. S., at 309, the court said:

“Nor is it clear that, even if the plaintiff was not free from fault, her negligence was the proximate cause of the injury. If she carelessly placed herself in a position exposed to danger, and it was *discovered* by the defendant in time to have avoided the injury by the use of reasonable care on its part, and the defendant failed to use such care, that failure might be found to be the sole cause of the resulting injury.”

In *Capital Traction Co. vs. Apple*, 34 App. D. C., the court said, at page 571:

“In the event that they should find that plaintiff’s intestate was guilty of contributory negligence, the jury were charged to inquire whether, notwithstanding such negligence, the motorman, after seeing his imminent danger, could have prevented the injury by the exercise of due care. And they were charged that *if the motorman saw the dangerous situation of plaintiff’s intestate in time to have averted it by the use of ordinary care*, the plaintiff would nevertheless be entitled to recover. The law was correctly stated.”

In *Capital Traction Co. vs. Crump*, 35 App. D. C., at page 177, the court said:

“To a certain extent these embody a proposition contained in the preceding instruction. In so far as they embody the proposition that though one may be in peril through his own negligence, *one who perceives that peril* is bound to exercise ordinary care to prevent doing him an injury, they are correct. *Capital Traction Co. vs. Divver*, 33 App. D. C., 332-336; *Capital Traction Co. vs. Apple, supra.*”

The use by the public of a crossing of a steam railway in the country is made under circumstances very different from those involved in the use of city street crossings and in the use of city streets. While the court in *Apple vs. Capital Traction Company*, 34 App. D. C., was not discussing the last clear chance doctrine, the following statement, found on page 569, is very material in consideration of the applicable rule of that doctrine:

“It is common knowledge that the conditions attending the operation of ordinary steam railways across country highways, and even city streets, and those attending the running of electric cars along the streets of an ordinary city, are essentially different. The former run at considerable intervals, have much longer and heavier trains, and are not easily brought to a stop. The latter run with frequency—car following car in rapid succession—are always in more or less crowded streets, and can be stopped quickly. The exigencies of daily traffic, and the needs and conveniences of individuals, result in constant crossing of street railway tracks both at and between street crossings. Knowing this those engaged in running the street cars are under a duty to exercise ordinary care to prevent running over vehicles and pedestrians.”

And, again, although in considering the duty to look and listen, the court said in *Washington Co. vs. Stuart*, 50 App. D. C., at page 75:

“Most of them deal with the duty of a person about to cross the tracks of a steam railroad. The rule in such a situation is quite different from that which applies in a case like the one before us. A railroad train or an interurban car is operated on the company’s right of way. No one has a right to assume that, as it approaches a street or road crossing, it will be under control, with a view of stopping promptly if the safety of a pedestrian or other person crossing the track requires it. This distinction has been recognized and applied many times, not only by this court, but by the courts of other jurisdictions.”

The difference—at least between city and country crossings—has been recognized by the courts of Maryland in the adoption of two distinct rules for the application of the doctrine of last clear chance—one rule for cities, towns and thickly settled localities, and another rule for railroad crossings in the open country. In *Maryland Central Co. vs. Neubeur*, 62 Maryland, 391, action was for injuries resulting from a collision with defendant’s locomotive at a public country road crossing. The court said (page 398):

“* * * The general principle is, that where both parties by their negligence directly contribute to the production of the accident, neither has a right to recover of the other for injuries sustained thereby. But there are exceptions to this general rule; and in cases like the present, the exception is that, if the defendant, or those acting for it, had become aware of the perilous situation of the plaintiff, though that

peril had been incurred by the negligent or even reckless conduct of the plaintiff, yet the defendant or its agents would be bound to use all reasonable diligence to avoid the accident. But in order that this qualification of or exception to the general rule may be successfully invoked by the plaintiff, *he must show knowledge on the part of the defendant, or its agents of the peril in which he, the plaintiff, was placed, and that there was time after such knowledge, within which to make the effort to save him from the impending danger.* * * *

In *State to use Trenary vs. United Co.* (Maryland, 1923), 122 Atlantic, 20, the court spoke of the modification of this rule in certain Maryland cases involving accidents in the streets of Baltimore City, and said (page 24) :

“Because of the thickly settled character of the adjacent territory, and because the railway tracks are in immediate proximity and laid along a public highway, which has many of the characteristics of a city street, of which it is but a continuation, *the rule stated in those cases, rather than that stated in the Neubeur case should apply.*”

As it is relevant in this connection, part of the extract from *Gerlach vs. Cumberland Co.* (Maryland, 1923), 121 Atlantic, at page 578 is again given :

“* * * The accident in this case occurred at a public crossing, in the open country, and *the modified rule* laid down in *Consolidated Co. v. Rifcowitz*, 89 Md., 338, * * * and *United Railways v. Ward*, 113 Md., 762, * * * and other cases applicable to much-used streets of a town or city, *does not apply to this case.* * * *

This rule as applied to country crossings is not new to this court. Although given with a reservation, the rule is plainly stated (and by no means rejected) by the court in *Washington Co. vs. Cullember*, 39 App. D. C., at page 324, in the following language:

“* * * The contention on behalf of the appellant is that in the application of this principle it is essential that the defendant shall have been actually aware of, that is to say, shall have actually seen the danger of the plaintiff in time to prevent injury by the exercise of reasonable care; and it is not sufficient merely that the defendant, as stated in the modification of the charge, could have seen him by the use of reasonable diligence ‘in time to stop the car.’ *Granting for the purpose of the argument that this may be the correct application of the rule in the case of steam railway trains crossing public highways, it does not necessarily follow that it extends to the operation of street cars in the streets of cities and towns.*” * * *

The Cullember case involved a collision between a street car and a street sweeping wagon on Ninth street N. W., near P and Q streets, in Washington. The court said in part (page 326):

“* * * Knowing that vehicles must frequently cross the car tracks, it was his duty not only to his passengers, whose safety might be endangered by collisions, but to the general public, to run his car within the rate of speed prescribed by law, to keep a lookout ahead of him, to keep his car under reasonable control, and to stop the same if reasonably possible to avoid injury to one who, even by his own negligence, had exposed himself to danger. *The condi-*

tions of modern city life make this a reasonable rule of sound policy looking to the preservation of the public safety. The evidence tended to show that the motorman, if exercising reasonable care, could have seen the danger of the plaintiff in time to have stopped his car, if under proper control, and avoided the collision. There was no error in the modification of the charge which submitted this question to the jury. * * *

The general doctrine of the last clear chance was discussed and considered at length by the court in the *Didzoneit*, *Stearman* and *Cullen* cases, and as so stated, was applied by the court in the earlier street car cases.

In the *Cullember* case, the trial court charged that if defendant's motorman either did see plaintiff, or could have seen him by the use of reasonable diligence and stopped the car, then it was his duty to do so. The Court of Appeals in its opinion in the *Cullember* case, approving this charge, apparently for the first time sanctioned a rule of the doctrine in this particular form. In no earlier opinion of the Court of Appeals has a statement of the doctrine in this exact form—"or could have seen him by the use of reasonable diligence"—been found.

But the language in which the court approved the charge in the *Cullember* case dealt exclusively with conditions in city streets, with the duties of motormen of street cars, and the reason for the rule was thus stated—"The conditions of modern city life make this a reasonable rule of sound policy looking to the preservation of the public safety."

Apparently the only decisions of the Court of Appeals involving the last clear chance doctrine, since the *Cullember* case, have been in street car and truck cases in city streets,

and the language of these cases, stating the rule as applied in the Cullember case, is confined with apparent care to the conditions of city traffic.

The rule herein contended for has been followed by many Federal courts. In the case of *Miller vs. Canadian Northern Ry. Co.*, 281 Fed., 664, the court said:

“But counsel insist that the plaintiff was entitled to recover under the last clear chance rule. That rule is not that, if the defendant or its engineer saw or could by the exercise of ordinary care have seen the plaintiff and realized his imminent danger in time to stop the engine before it struck him, the defendant is liable for the ensuing injury. That doctrine or exception to general rules is limited to cases in which the defendant actually discovers the person injured and his peril in time to avoid the injury. It does not include cases where, by the exercise of ordinary care, the defendant might have made such discovery in time to avoid the injury.”

To the same effect are:

Hart vs. Northern Pac. R., 196 Fed., 180.

Marshall vs. Hines, 271 Fed., 165.

Denver City Tramway Co. vs. Cobb, 164 Fed., 41.

Davis vs. Phila. & R. Ry. Co., 276 Fed., 187.

Dunworth vs. Grand Trunk R. Co., 127 Fed., 307.

Newport Co. vs. Howe, 52 Fed., 362.

Chunn vs. City, &c., Ry., 207 U. S., 309.

Inland, &c., Co. vs. Tolson, 139 U. S., 551.

Herr vs. St. Louis & S. F. Ry. Co., 174 Fed., 938.

III.

The Alleged Negligence of the Defendant is Not Shown to Have Been the Proximate Cause of the Injury.

We have heretofore endeavored to point out the entire failure of plaintiff's evidence to establish any negligence on the part of the defendant. If our interpretation of the record is correct, that, of course, would end the case and there would be no further necessity for discussion. If, however, it could be possible to spell out of the testimony any evidence of negligence on the part of the defendant, the plaintiff would be required to go still further and show that that negligence was the proximate cause of the injury. In the absence of all proof as to what Bennett's movements were after he was last seen by Arnold crossing track 18, we cannot see how it could be logically possible to say that the conduct of the employees on the shifting engine was negligent, and that that negligence was the proximate cause of the injury to Bennett. This proposition seems to us so plain as to not need argument.

“For the plaintiff to recover under the Federal Employers' Liability Act, it is not sufficient that he prove negligence and injury under conditions within the terms of the act. To create a jury issue, the plaintiff must introduce proof tending to show that the alleged negligence was the proximate cause of the damage. * * * The inquiry whether proof having such tendency has been introduced, is not to be solved by indulging in mere surmises or conjecture or by resorting to imaginary possibilities, for to do so would

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but resolve the question to the generic rule of liability as an insurer."

1st Roberts' Federal Liabilities of Carriers, Par. 538, p. 942, and cases cited.

In the case of *Winona vs. Botzet*, 169 Fed., 321, the court, in defining proximate cause, said (p. 328):

"The proximate cause of an injury is the primary moving cause, without which it would not have been inflicted, but which, in the natural and probable sequence of events, and without the intervention of any new or independent cause, produces the injury. The intervening cause that will insulate the wrongful act or omission from the injury and relieve of liability for it, must be an independent intervening cause which interrupts the natural sequence of events, prevents the ordinary and probable result of the original act or omission, and produces a different result which could not have been originally anticipated."

See also *Saugerities Bank vs. Delaware & Hudson Co.*, 141 N. E., 904.

It would serve no useful purpose to discuss the cases cited in appellant's brief under the title of Assumption of Risk, as they do not appear to us to be in point and are not helpful in the solution of this case. In view of the many decisions of the Supreme Court and of this and other courts on the subject, it is unnecessary to cite authority now to show that the Employers' Liability Act does not affect or modify the common-law rule of assumed risk. Of course, if Bennett lost his life as the result of one of the many but usual risks incident to his employment in the yard, his administratrix would not be entitled to recover.

IV.

There Was no Error Committed by the Trial Court in the Admission or Exclusion of Evidence Covered by Assignments 2 to 6.

As hereinbefore stated, it will be unnecessary, in our view, for the court to consider the questions raised by assignments of error 2 to 6, because the main and controlling question in the case is raised by the first assignment of error.

We do not wish to be understood, however, as admitting that there is any merit in assignments 2 to 6 by not referring to them in our brief.

Assignments 2, 3, and 4 refer to the ruling of the trial court in permitting the defendant's employees on the engine to testify that there was nothing unusual in the movement in which the engine was engaged at the time of the accident, the manner of making that movement, and the conduct of the crew on the engine during the course of that movement. It will be recalled that this evidence was sought to be brought out by the defendant while cross-examining plaintiff's witnesses who were produced for the purpose of showing negligence, if such were possible, in the handling of the movement in question. These witnesses were called by the plaintiff in the attempt to prove that they were themselves negligent in some way, and that their negligence was a contributing cause to the accident. We submit that the questions asked were proper cross-examination of the witnesses under the circumstances, and that the evidence brought out by such cross-examination was proper for the purpose of negating any inference of negligence growing out of the conduct of these employees.

“Negligence cannot be inferred from an act done in the usual and ordinary way.”

Weireter vs. Gt. Northern R. R. Co., 178 N. W., 887.

Jas. Stewart Co. vs. Newby, 266 Fed., 287

In the *Weireter case* the court said:

“Negligence cannot be inferred from an act done in the customary way, and the action must fail unless there is produced expert or other evidence which would justify the jury in finding that even though the act was done in the usual way, it was, nevertheless, negligently done, or unless it may be said that the common experience of the ordinary juror makes him competent to determine without aid of evidence whether or not the act was negligently performed * * * It cannot be assumed that the ordinary jurors are competent without evidence and from common knowledge to fix the standard by which switching operations must be carried on in much used railroad yards.”

Assignments 5 and 6 relate to the ruling of the trial court on the exclusion of two operating rules of the defendant company.

Appellant has quoted in her brief (p. 9) the testimony of McCleary, which she claims made rule 15 admissible and relevant evidence. The rule required conductors or brakemen in charge of movements to and from the coach yard to ride the front end of said movements; but there was no evidence in the record that the engine on the occasion of the accident was executing a movement to or from the coach yard. The trial court persistently requested counsel for appellant to point out such evidence, if any existed, and counsel finally made the admission found in the record (p. 26):

“There is no evidence in this case that this engine, upon this trip, was coming from the coach yard.”

The following colloquy between counsel and court then took place:

“Mr. Gardiner: Then will your Honor permit me to call this engineer back, if that is in question, and ask him just where it was coming from?”

The Court: Why surely. We want to develop all the facts.”

But counsel for appellant never did recall the engineer, and closed his case without offering any other testimony on the subject. Surely he cannot now be heard to complain of the court's ruling based upon his own admission that there was no evidence on the subject in the case.

Rule 16 provided that “when trains are run against the current of traffic they must be run carefully, looking out for employees working about tracks.” Objection was made by the defendant to the admission of this rule on the ground that it was irrelevant and did not apply to the circumstances of this case. Before ruling on the question the trial court asked for all evidence that the appellant could produce to show the bearing, if any, the rule had upon the case (Rec., p. 27).

In the first place the rule related specifically to *trains* run against the current of traffic, and did not include yard engines, the very nature of whose business was to travel about the yard and station, back and forth, as the work of the yard might require.

In the second place, witness McMahon, who testified as to this rule (Rec., p. 27), said that it applied only to tracks

48, 49, and 50, which are not station tracks—that is, do not run into the station or the portion of the yard just beyond the station, as shown by the plat offered in evidence, but referred to tracks north of New York Avenue. As to the tracks in and around the station, witness said (Rec., p. 27) :

“There is no current of traffic in and around Union Station. There we go according to signals. Trains and engines are moved on any track in any direction that they may be sent, according to signals received from the towers.”

Upon this evidence the court, we submit, was bound to hold that the rule had no application to the situation in hand. But even in so ruling the court again offered to permit counsel for appellant to produce other evidence, if he so desired and could do so, to show that the rule was admissible, and such offer of further evidence was never made.

We cannot see how these rules, or either of them, if they had been admitted in evidence, would have had any tendency to prove negligence by the defendant which could be fairly said to have been the proximate cause of the accident.

McGlauffin vs. Boston & Me. R. R., 230 Mass., at p. 434.

We respectfully submit there is no error in the record, and the judgment of the court below should be affirmed.

Respectfully submitted,

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